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OVERVIEW OF ANTI-BRIBERY RULES

IN THE ARAB MIDDLE EAST

by

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I. INTRODUCTION

Corruption is a global disease, and the Arab Middle East has certainly not been immune from its debilitating effects. There are many strains of corruption, perhaps most notably in bribery of government officials (the subject of this article), but also including various types of insider trading, and extending to misuse of government institutions for personal gain.

Each country in the Arab Middle East has laws imposing harsh criminal liability on those convicted of bribery. In many instances, the applicable penal laws are derived from European (civil law) patterns. Modern Middle Eastern anti-bribery rules are also influenced by, and consistent with, early Islamic law principles prohibiting bribery. As a practical matter, however, the prevalence (and government prosecution) of bribery in a particular country may reflect a number of diverse factors, such as the wealth (or poverty) of the populace, the respective roles of government and business, and the legitimacy (and independent authority) of judicial and executive branches of government.

For over twenty-three years, Mr. Stovall has assisted clients on commercial law matters throughout the Arabic-speaking countries of the Middle East. He has served as an Arab law expert in judicial and arbitral proceedings in the United States and Europe, and recently taught "Comparative Commercial Law of the Arab Middle East" as an adjunct professor at John Marshall Law School in Chicago.

For purposes of illustration, this article focuses on the broad and detailed anti-bribery provisions of the Egyptian Penal Law. This article also cross-references some comparable provisions in other anti-bribery laws in the Arab Middle East.

II. ANTI-BRIBERY UNDER PENAL LAW

The most significant anti-bribery provisions of the Egyptian Penal Law are directed towards public sector officials, to ensure that the government will function properly, and that no public official will use his position to obtain personal benefit. However, a few other provisions of the Egyptian Penal Law also impose punishment on a private sector employee receiving a bribe.

A. Elements of Bribery

Under Egyptian law, there are three elements to the crime of bribery: (1) the recipient of the bribe as a "public official" with "official duties"; (2) the benefit (such as a gift or promise thereof); and (3) the required criminal intent.

(1) The "Public Official" and "Official Duties"

Article 111 of the Egyptian Penal Law broadly defines "public officials" (for purposes of anti-bribery rules) to include not only employees in government departments, but also members of general or local legislative assemblies, and similar persons entrusted with public service. In that light, the Egyptian courts have decided that some organizations, given their nature or purposes, are "public" entities and consequently that their employees are considered to be public officials. For example, a boat pilot working in the Suez Canal is a public official, because the Suez Canal Authority administers a public utility.

Under Egyptian anti-bribery rules, a public official is not trading on his position unless the requested or promised action was within the duties of the official's position. However, such "official duties" are understood as any action within the legal scope of the official's position -- even if only indirectly related to official duties. For example, although the cook at a government orphanage did not have primary responsibility for inspecting the food delivered to that orphanage, that cook (by virtue of his job) was in a position to inform the proper authorities of any unwholesome food delivered to the orphanage. Therefore, a payment made to the cook -- to induce him to

overlook the delivery of spoiled food -- was bribery. In addition, this element of bribery is satisfied even if the official wrongly believes or claims that the requested or promised action is within his duties. (See also Article 188 of the Bahraini Penal Law of 1976.)

(2) The Benefit (a Promise or a Gift)

The benefit constituting the bribe may be the promise or payment of money received or requested by an official. The benefit might also be the briber's agreement to discharge a debt otherwise owed by the official. Similarly, the benefit may be implied from the terms of an 'imbalanced' contract arising between the briber and the recipient of the bribe; for example, the benefit that an official obtains by selling his personal property for a price greater than its true value. (See also Article 109 of the Qatari Penal Law of 1971, as amended.) Article 107 of the Egyptian Penal Law extends punishment to the official who receives a benefit without precise monetary equivalent, such as obtaining employment for a family member. (See also Article 38 of the Kuwaiti Penal Law of 1960, as amended.)

Egyptian anti-bribery rules do not make a distinction between the benefit that an official obtains for himself and the benefit requested or accepted for another party. For example, the Egyptian Penal Law applies anti-bribery principles to "every public official requesting [a benefit] for himself or for another" (emphasis added).

(3) Criminal Intent

Criminal intent of both the official and the payer is an essential element of the crime of bribery. For the payer to be guilty of bribery, he must have intended to reward the official for what the latter has done, or intended to induce the official to perform or to refrain from performing an act or to misuse that official's office.

One example that is provided by Egyptian commentators: a farmer pays the driver of an automobile to help transport the farmer's crop to market, not knowing that the driver was a public official and that the automobile was government-owned. The crime of bribery should not be deemed to exist in these circumstances, as the farmer lacked the requisite criminal intent.

B. Punishment for Bribery**(1) Penalty for the Recipient of a Bribe**

Under Egyptian Penal Law, the recipient of the bribe may be punished by life imprisonment with hard labor and a specified monetary fine. However, if the intent of the bribe was to make the public official abstain from a function of his position or violate its duties, then (in addition to the imprisonment punishment) the recipient of the bribe would be penalized by double the otherwise applicable fine. The doubled fine is justified in such circumstances because the public official would not only be trading on his position by accepting the bribe, but also acting improperly in the underlying performance of his job.

Moreover, Article 110 of the Egyptian Penal Law generally permits confiscation of the bribe itself. A public official who commits bribery is also subject to disciplinary penalties, essentially a matter of administrative (rather than criminal) law.

(2) Penalty for the Briber (or Intermediary)

Under Article 107 bis of the Egyptian Penal Law, the briber and the intermediary are considered accomplices in the crime of bribery, and are subject to the same punishment as the recipient of the bribe. (See also Article 172 of the Jordanian Penal Law of 1960.)

(3) Exemption from Punishment for the Briber/Intermediary

The primary focus of Egyptian anti-bribery rules is on the public official. In this light, Article 107 bis of the Egyptian Penal Law gives the briber (and any intermediary) exemption from punishment for reporting (confessing to) the crime to the appropriate government authorities.

As in other circumstances when a criminal is given immunity from prosecution, this provision of Egyptian criminal law has come under criticism at various times. However, it reflects the difficult burden that government prosecutors often face in attempting to prove bribery crimes. In order to safeguard the public's paramount interest in this context -- prosecuting government officials who accept bribes -- the Egyptian legislature decided that bribers and intermediaries should be encouraged to reconsider their actions and assist the government by providing evidence of bribery.

C. Attempted Bribery

If the briber's actions were only subject to general Egyptian Penal Law rules of "accessory", then the mere offer of a bribe could not be punished -- absent a government official's acceptance of the bribe, the crime of bribery would not exist, and consequently no accessory could exist. In that light, the Egyptian Penal Law was amended to prohibit, in Article 109 bis (First), the mere offering of a bribe. As was observed of the similar article of the Italian Penal Law: "Even if the offer [of a bribe] is not accepted, the public interest is realized by providing a penalty on anyone who attempts to undermine the responsibility of the official ... ". (See also Article 111 of the Qatari Penal Law of 1971, as amended.)

D. Private Sector Employees

The Egyptian Penal Law provides for a misdemeanor crime of bribery if a private sector employee was the recipient of the bribe. For example, under similar provisions of French law, the manager of a private sector hotel was penalized for bribery when, without the hotel owner's knowledge, that manager accepted money from a butcher in exchange for keeping the butcher's name on the hotel's list of acceptable suppliers.

III. OTHER LAWS COMBATTING BRIBERY

In addition to the anti-bribery provisions of Middle Eastern penal laws, there are a number of other Middle Eastern laws and regulations with punishments for bribery. For example, various Middle Eastern constitutions and civil service regulations prohibit government employment of individuals who have been guilty of bribery crimes. In addition, many Middle Eastern government tender laws disqualify potential bidders who have been guilty of such crimes. (See, e.g., Articles 83(f) and 85(b) of the UAE Federal Armed Forces Tender Law of 1986, and Article 63(1)g of the Kuwaiti Ministry of Public Works standard contract.)

IV. CONCLUSION

Despite the strict Middle Eastern anti-bribery laws discussed above, few multinational corporations have been criminally prosecuted for bribery in Middle Eastern courts. There are a number of possible explanations for the relative

dearth of such prosecutions in the Arab Middle East. For example, bribery is generally a difficult crime to prove. In addition, a number of Arab legal systems contain the general principle of "personal" (rather than corporate) responsibility for crimes committed. Thus, the Egyptian Court of Cassation has long ruled that corporate entities are not criminally responsible for crimes committed by their employees, but rather the individuals who commit the crime are personally responsible. As a result, in a number of prior instances in which an expatriate employee of a multinational corporation has been accused of paying a bribe, the employee has negotiated a plea bargain allowing him to (quietly) leave the Arab country persona non grata. In such cases, local authorities may prefer to devote their resources to prosecuting the government official allegedly receiving the bribe.

Despite the above, as a matter of day-to-day practice, Arab government prosecutors regularly investigate and prosecute bribery crimes, and local courts have imposed strict statutory punishments -- in some recent cases, involving relatively high-level Arab government officials.

Over the past decade or so, the Arab World has gradually become a less accommodating environment for corruption. In part, expanding local populations have put greater financial demands on Arab governments, in turn drawing greater attention to the inefficiencies of corrupt practices such as bribery. Some of the change might also be due to the shift from state-controlled to free market economies, with Arab governments realizing the need to provide a proper environment for the increasingly important private sector. International initiatives in support of good governance and "the rule of law" provide useful support. Ultimately, however, home-grown remedies will be the best prescription in the battle against bribery and corruption in the Arab Middle East.

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3 June 2005